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Supreme Court of the United States

OCTOBER TERM, 1953.

No. 700

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD.; KAWASAKI KISEN KAISHA; NISSAN KISEN KAISHA, LTD.; TOHO KAIUN KAISHA, LTD.; IINO KAIUN KAISHA, LTD.; MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, LTD.; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSEMS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRALIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBASKTIESELSKAPET VARILD; SKIBASKTIESELSKAPET MARINA; AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD; SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG; SKIBSAKTIESELSKAPET IGADI; A/S BESCO; AKTIESELSKAPET IVARANS REDERI; A/S LISE; THE DE LA RAMA STEAMSHIP CO., INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION CO., LTD.; NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAAN" N. V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERICAN PRESIDENT LINES, LTD.,

Petitioners,

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, *et al.*,

Petitioners,

—against—

UNITED STATES OF AMERICA; ISBRANDTSEN COMPANY, INC.; and FEDERAL MARITIME BOARD, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners herein, the Japan-Atlantic and Gulf Freight Conference and its seventeen member lines, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a judgment of that court entered on January 21, 1954.

Opinion Below

The opinion of the court below and the dissenting opinion of Judge Fahy have not yet been officially reported. They are included in the record herein at R. 248 and R. 259.

Jurisdiction

The jurisdiction of this Court is invoked under 5 U. S. C. § 1040 and 28 U. S. C. § 1254(1). The petition is timely, the judgment of the court below having been entered on January 21, 1954.

Statement of the Case

On June 25, 1934, the Board,[1] pursuant to Section 15 of the Shipping Act, 1916 (46 U. S. C. § 814), approved an agreement under which, as amended, the Japan-Atlantic and Gulf Freight Conference has since been operating (R. 222). That agreement provides, *inter alia,* that one of the purposes of the Conference is the establishment, regulation and maintenance by agreement of the rates, tariffs and charges of its members (R. 223-4). Such tariffs and charges are established according to described methods and are filed pursuant to regulation with the Board. The Conference has as its members the seventeen carriers who are petitioners herein and who comprise all of the common carriers in the trade from Japan, Korea and Okinawa to United States Atlantic and Gulf ports, with the exception of the respondent Isbrandtsen Company, Inc. (to whom membership in the Conference has at all times been available).

Since its creation, the Conference has filed with the Board literally thousands of rates, rate changes and rules adopted by it. This practice is in accord with that required of all of the 105 existing freight con-

[1] The Federal Maritime Board and its predecessors are herein referred to as "the Board".

ferences operating on every important United States foreign trade route. The rate filings of these conferences made at the Board each year number in the tens of thousands.[2]

Because of the mass of such material filed with the Board each year, the Board early construed Section 15 of the Shipping Act to require approval by it in each instance of the conference agreements "whereby the carriers propose to be governed in their conference activities" but not to require an additional approval of all rates, tariffs and charges adopted pursuant to those agreements.[3]

This construction of Section 15 has for twenty-seven years been the fixed administrative practice of the Board. Once the basic conference agreements have been approved by the Board, the thousands of rate changes and rules thereafter adopted by the conferences are not made the subject of separate inquiry under Section 15 and no approval of them has been given. If certain proposed action or action actually taken under a conference agreement is deemed to be violative of the Shipping Act, it can be made the basis for a complaint and for a demand for reparations under Sections 22 and 23 of the Act (46 U. S. C. §§ 821, 822).[4] The Board upon its own initiative or upon complaint of others can also force postponement or abandonment of such proposed or actual actions under penalty of withdrawing its approval of the basic conference agreement on the ground that if the agreement is being interpreted as per-

[2] In its brief to the court below the Board stated, at p. 18, "During 1952 rate filings exceeded 2,000 . . . each month."

[3] *Section 15 Inquiry*, 1 U. S. S. B. 121 (1927).

[4] *E. g., Rawleigh* v. *Stoomvaart*, 1 U. S. S. B. 285 (1933).

mitting such action its disapproval under Section 15 is required. The Board has repeatedly exercised that power.[5]

Acting under their basic conference agreements, many conferences have adopted so-called contract/non-contract tariffs to defend against certain practices of non-conference lines which threaten the ability of the conference to maintain frequency of service and stability of rates. These tariffs establish a lower rate for any shipper who agrees to ship all of his cargoes on conference vessels as contrasted with shippers who do not enter into such agreements.

The Board has followed its normal administrative practice with respect to these contract/non-contract tariffs and has not required its approval in advance of their adoption.[6] Subsequent inquiry into their lawfulness and reasonableness could, however, be made on the Board's own motion or on the motion of some interested party. The courts, moreover, have refused to restrain conferences from employing such tariffs although no specific Board approval had been obtained, holding that the protestants were required to seek their relief before the Board in accordance with the procedures set forth in the Shipping Act.[7]

In 1948, however, a three judge District Court sitting in the Southern District of New York, while re-

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[5] *E. g., Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11 (1948).

[6] Thus until 1941 the petitioners employed contract/non-contract tariffs without specific approval thereof by the Board.

[7] *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932); *Far East Conference* v. *United States*, 342 U. S. 570 (1952).

fusing to pass on the validity of a contract/non-contract tariff until the Board in an adversary proceeding had first decided the question, held itself empowered, as a court of equity, to enjoin the employment of such tariff pending such proceedings because the Board did not there assert the power to delay the effectuation of such tariffs pending the outcome of the adversary proceeding.[8] As a result of that decision and of a subsequent decision in the same case,[9] and in order to cure judicial intimations of defects in the Board's procedure, the Board, effective November 11, 1952, adopted General Order 76 (R. 78). That order requires the filing of a statement giving notice of the effective date of a proposal to institute contract/non-contract tariffs 30 days in advance of its effectiveness and containing *prima facie* proof of the lawfulness of the use of such tariffs and the reasonableness of the differentials. It provides also a method by which protests to the proposed action can be filed with and considered by the Board prior to the tariffs becoming effective.

On December 24, 1952, the Japan-Atlantic and Gulf Freight Conference filed with the Board a statement containing its proposal for a contract/non-contract tariff (R. 82). As required by General Order 76, the statement set forth the reasons for the use of contract/non-contract rates and justified the differential between them.

The reasons advanced in support of the proposed tariff were generally that under the conference system,

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[8] *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (1948), appeal dismissed, *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 336 U. S. 941 (1949).

[9] *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (1951), affirmed by an equally divided court, *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 342 U. S. 950 (1952).

the Japan-Atlantic trade had enjoyed stability of rates over a long period of time and had experienced a progressive improvement in services rendered to shippers; that in recent periods, Isbrandtsen, a non-conference carrier, through the use of competitive practices long condemned by the Board, had been taking an increasing share of the traffic; that the Conference members were unable to compete effectively with Isbrandtsen while governed by the existing Conference rates; and that in order to permit effective competition without subjecting the trade to the dangers and evils of a full scale rate war, a contract/non-contract tariff was necessary and was in the public interest (R. 96-98).

Within the time prescribed by General Order 76, Isbrandtsen and the Department of Justice filed objections to the proposal (R. 140, 161, 171, 215, 217). Isbrandtsen claimed that the Conference's statement was deficient, that the reasons advanced for the adoption of the tariff were unsound, and that the amount of the differential had not been adequately supported. The Department of Justice similarly claimed that the Conference's statement was insufficient and urged that the use of a contract/non-contract tariff was violative of the Shipping Act and of the Anti-trust Laws. Both protestants requested a hearing and urged that the initiation of the proposal be suspended pending such hearings and final determination by the Board (R. 158-9, 216).

On January 21, 1953, the Board after considering the statement of the Conference in support of the proposed tariff, the comments, affidavits and documents relating thereto filed by Isbrandtsen and the Department of Justice, and the memorandum and affidavits

of the Conference in reply (R. 181, 201, 212), denied the requests for suspension upon the basis of the *prima facie* case made by the Conference and upon a finding that no irreparable injury would result to Isbrandtsen, but undertook to make a final determination of the whole matter by granting the requests of the protestants for a hearing (R. 220).

Isbrandtsen thereupon filed a petition for review of this action in the court below (R. 1) and at the same time applied for a stay of, and an interlocutory injunction against the Board's action. The petitioners intervened (R. 72). The interlocutory injunction was granted by the court without opinion, Judge Fahy dissenting (R. 239, 243). Petitions for Certiorari were filed in this Court by the Board and the Conference seeking a review of the grant of the interlocutory injunction. These petitions were denied, 345 U. S. 975. Thereafter, the court below entered the judgment of which review is here sought (R. 261). Judge Fahy again dissented.

Questions Presented

The court below, holding that the action of the Board refusing to suspend the proposal for a contract/non-contract tariff was a final order under Section 2 of the Hobbs Act (5 U. S. C. § 1032), set aside that "order" on the ground that such a proposal was an "agreement" or a "modification" of an agreement which required the specific approval of the Board under Section 15 of the Shipping Act before the parties could lawfully carry it out. It further enjoined petitioners from putting such proposal into effect

until the requisite approval had been obtained. The questions presented are:

1. Whether the Shipping Act, 1916, requires the Board to give specific approval to a practice so common among conferences as the use of contract/non-contract rates (and, indeed, potentially to every other kind of rate) before the rates may be initiated even though such rates have been established pursuant to procedures set forth in previously approved conference agreements?

2. Whether the Board may pursuant to its administrative practice and regulations deny, on the basis of a *prima facie* showing, a request for a postponement of a proposal for a contract/non-contract tariff adopted in accordance with an approved conference agreement provided that the Board at the same time undertakes to determine after a full hearing the ultimate question as to whether such proposal is violative of the Shipping Act or is otherwise to be prohibited under Section 15 of that Act?

3. Whether an order of the Board denying a request to suspend a proposal for a contract/non-contract tariff pending further hearings to determine whether the proposal violates any of the provisions of the Shipping Act or the other requirements of Section 15, which order does not purport to immunize the conference or its members from the penalties and reparations to which they may be subjected in the event their action is later found to be violative of the Shipping Act, is a final order reviewable under 5 U. S. C. § 1032?

Statutes Involved

The pertinent sections of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U. S. C. § 801 *et seq.*, and of the Hobbs Act, Pub. L. No. 901, 81st Cong., 2d Sess., 64 Stat. 1129, 5 U. S. C. § 1031 *et seq.*, are set forth in the attached Appendix.

Specification of Errors to Be Urged

The court below erred:

(1) In holding that specific approval of the Board was required for a proposal to establish a contract/non-contract tariff by a conference despite the fact that such proposal was adopted pursuant to procedures set forth in a conference agreement that had theretofore been approved by the Board.

(2) In holding that the Board, upon a *prima facie* showing of the reasonableness and lawfulness of such a proposal for a contract/non-contract tariff, could not refuse to suspend such proposal and reserve to itself the right to consider its lawfulness after full hearing.

(3) In holding that a refusal of the Board to suspend the effectiveness of a proposal for a contract/non-contract tariff pending hearing upon its ultimate validity was a final order under Section 2 of the Hobbs Act (5 U. S. C. § 1032).

(4) In finding that irreparable injury would result to Isbrandtsen from the action of the Board despite an express finding by the Board to the contrary.

Reasons for Granting the Writ

I. The Decision of the United States Court of Appeals for the District of Columbia Circuit Is of such General Importance to the Foreign Commerce of the United States and to the Administration and Construction of the Shipping Act, 1916, as to Require Its Review by this Court.

The decision of the United States Court of Appeals for the District of Columbia Circuit has a direct, immediate and profound effect upon the foreign commerce of the United States and upon ocean carriers and shippers throughout the world. It is a bold reversal by the court of a well established and long standing construction given to Section 15 of the Shipping Act by the Board. It requires the Board to alter the method used for the past twenty-seven years in administering that Act, and it raises substantial obstacles to the continued effective administration of that Act. The impact and importance of this unprecedented decision by the court below requires its review by this Court.

Section 15 of the Shipping Act gives the Board supervisory power over all agreements between common carriers by water engaged in the foreign commerce of the United States which fix or regulate rates and control competition. It is by virtue of this section that American exporters are permitted to enjoy the same rate stability as do their foreign competitors who ship by carriers in freight conferences that exist in the foreign trade routes of the world. The administration of that section is vital to the entire scheme of conference operations and as such to American shipping and trade in our foreign commerce.

There are today 105 freight conferences operating on every major foreign trade route of the United States. All of these conferences operate under and by virtue of basic organic conference agreements which have been submitted to, and approved by the Board.

Limiting the decision of the court below to the very facts presented in this case, it means that these freight conferences may not establish contract/non-contract tariffs unless and until proposals to establish the same have been specifically approved by the Board. Today 64 conferences utilize contract/non-contract tariffs without specific and formal approval by the Board under Section 15.[10] The decision means, therefore, that all of the carriers in these 64 conferences have been and are acting illegally. To the individual members of these conferences it means they may now be faced with a multitude of suits for damages and reparations and to actions for the heavy penalties stipulated in Section 15 since although the Board was aware of such practices, they were technically violative of the Shipping Act inasmuch as they had not been specifically approved.

It means further that none of the conferences without such tariffs may institute them promptly when the competitive and economic conditions in their trades may require, but must await the outcome of protracted

[10] All of the conference agreements under which contract/non-contract tariffs have been promulgated authorize the conference to deal with rates, charges, tariffs, etc. A few of them in general terms expressly authorize the promulgation of contract/non-contract tariffs. Since such action is obviously the establishment of a particular form of tariff, the general authority to establish tariffs includes the authority to establish such a particular form of tariff, provided that it is not otherwise *ultra vires* the authority granted to the conference or violative of the standards set forth in Section 15 of the Shipping Act.

proceedings incident to formal approval by the Board. Since contract/non-contract rates represent the most important competitive tool used by conferences to maintain a stable rate structure and regularity of schedules in the face of competitors such as Isbrandtsen, whose consistent policy is to quote rates at a fixed percentage below conference levels, the decision means that whenever a conference is faced with such competition, due to the inherent delay required for specific Board approval, individual members will be forced either to resign from the conference so as no longer to be restricted by the conference rate levels, or the conference must itself declare an open rate situation to permit its members to charge whatever they desire.

Untoward delay in approval can in and of itself be destructive of the conference. Such a challenge, particularly in a period when cargoes are scarce, must be met quickly if at all. Not only does the decision prevent this but, as will be seen later, the import of the decision below might place an equal handicap upon the conferences' other method to deal with this problem, namely the resort to open rates.

The experience in the trade served by the petitioners herein is illustrative of this fact. Isbrandtsen entered this trade in mid-1947. Although membership in the conference was available to it, it refused to apply, and following its customary policy, it quoted rates at a fixed percentage below the conference rates. To defend their rate structure petitioners filed their proposal for a contract/non-contract tariff with the Board (R. 92-8). When the court below issued its temporary injunction, the proposal had to be abandoned, but the competitive problem facing the con-

ference lines remained. Since in the face of the economic crisis it was impractical for the conference to await final determination by the Board (indeed, although some seventeen months have elapsed since the proposal was filed, not even a preliminary examiner's report has been made), the only solution for the Conference was to declare an open rate situation. A vicious and destructive rate war has ensued—and in rate wars American carriers, because of their inherently higher costs, always suffer the most.

The import of the decision of the court below cannot be limited to contract/non-contract rate situations, for the theory of the decision is equally applicable to all rate revisions which may be proposed by a conference. The court below has suggested that "an interstitial sort of adjustment" under an approved conference agreement might not require specific approval by the Board (R. 257), and the Department of Justice suggested in its brief to that court that "routine rate adjustments" might not require such approval. Such semantic differentiations certainly form no guide for administrative action by the Board or by the carriers. Is a determination to open a rate, which may well be construed as an "agreement" to terminate a prior agreement on a rate, an "interstitial adjustment" or a "routine" matter? Such action by a conference is major in import. It is the use by the conference of the tool alternate only to the establishment of contract/non-contract tariffs and having the same objective, but at the sacrifice of rate stability.

Rates are fixed by the conferences as a result of economic and competitive situations. They must be flexible and responsive to the times and the particular characteristics of trade. A conference carrier can-

not, as a practical matter, use a conference rate which no longer reflects the economic situation in which it is operating. If specific Board approval is to be required for every rate change proposed by a conference, conference rate-making so far as carriers on American trade routes are concerned will be at an end; for even if the Board were substantially to increase its staff and streamline its procedures, it could not hope to pass upon the thousands of proposals it receives each month without a significant time lag. It could not even winnow out those that courts later might regard as "interstitial" or "routine". It is submitted that nothing in the history or the language of the Shipping Act contemplated such obstacles to conference rate-making.

II. The Decision of the Court Below Is in Conflict with Applicable Decisions of this Court.

Integral to the decision of the court below is its conclusion that the adoption by a conference of a contract/non-contract tariff is subject to the operation of the anti-trust laws and is, therefore, illegal *per se* in the absence of specific approval by the Board under Section 15 (R. 258-9). As a result, the court reasoned, the Board could not allow such a tariff to be used without its approval and the Conference lines should be enjoined from its use.

This is contrary to the holdings of this Court in two cases on this very subject, which decisions were not even cited by the court below. The decision is also contrary to a recent decision of that same court, the opinion in which was written by the same judge who wrote the majority opinion below.

In *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474 (1932), and *Far East Conference* v. *United States,* 342 U. S. 570 (1952), this Court ruled that the use of contract/non-contract tariffs by a conference, although the use of such tariffs had not been approved by the Board and, indeed, although the proposal to use such tariffs had not even been filed with the Board, was not actionable under the anti-trust laws and that court proceedings seeking to enjoin their use could not be entertained until the Board had an opportunity to consider and rule upon the matter. And in *S. S. W., Inc.* v. *Air Transport Association,* 191 F. 2d 658 (D. C. Cir. 1951), the court below ruled that an anti-trust action against the Air Transport Association and its member lines could not be entertained until the Civil Aeronautics Board (whose statutory authority in this respect is similar to that of the Federal Maritime Board) was given an opportunity to pass upon the course of conduct of the Association and its constituent members.

If, as the court below concluded, the contract/non-contract tariffs are subject to the anti-trust laws and illegal *per se* in the absence of prior approval, then the injunctive relief sought in each of the three above decisions should have been granted.

Accepting those decisions as correct, however, the action of the court below has produced a truly anomalous result. If contract/non-contract rates are put into effect by a conference without prior reference to the Board, the courts will refuse to enjoin them under the anti-trust laws until the Board has adjudicated the matter. If, however, the proposal to employ such rates is submitted to the Board before its institution and the Board allows it to become effective upon a *prima facie*

showing as to its validity, but reserves its ultimate decision until a hearing be had, the courts may then treat that action as a violation of the anti-trust laws and grant an injunction. Thus, the less carefully the Board supervises the action of conferences from a public interest standpoint, the less the ability of the courts to give relief to persons affected by the conference action. Surely, neither Congress in adopting the Shipping Act nor the courts in their prior decisions in this field intended such a result.

The decision of the court below is without precedent. Respondents have relied upon *Isbrandtsen Co.* v. *United States,* 81 F. Supp. 544 (S. D. N. Y. 1948), appeal dismissed, *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.,* 336 U. S. 941 (1949), where a three judge district court granted an injunction against the use of a contract/non-contract tariff, as to which no *prima facie* showing of validity had been made, pending the filing of protests thereto with the Board and the disposition of such protests by the Board. But that decision rested upon the finding of the court that the Board did not then assert the power to afford a party temporary relief against irreparable injury pending consideration of the tariff by the Board, and the conclusion of that court that as a court of equity it could give such relief.

Since that decision General Order 76 now permits the Board to give preliminary consideration to proposals for contract/non-contract tariffs before they become effective. If, based upon the materials submitted and the Board's own expert knowledge of the trade, the Board believes no *prima facie* showing as to the validity of the proposal has been made, or

that immediate irreparable injury is likely to occur, it can act at that time to suspend it.[11] Thus there is no longer any need or basis for court intervention as in *Isbrandtsen* v. *United States, supra.*

Patently, General Order 76 sought to implement the handling of contract/non-contract tariff problems under Section 15 of the Shipping Act by subjecting this rate making function of conferences to supervisory safeguards more stringent than those prevailing prior to its adoption. These safeguards are akin to those controls that the Interstate Commerce Commission has been given over the tariffs of carriers subject to its jurisdiction. That Commission can suspend tariffs filed with it, but its refusal to do so pending a hearing on their lawfulness is not reviewable by the courts. *Carlsen* v. *United States,* 107 F. Supp. 398 (S. D. N. Y. 1952). In the absence of these increased safeguards that have been administratively devised, this Court has twice said that nevertheless the Board must first be asked to pass upon the legality of concerted carrier action before it can be enjoined. The court below, however, now says that the very existence of these administrative safeguards and compliance with them by the Board authorizes the court to enjoin such concerted carrier action prior to a determination by the Board of those very issues which have been committed to its primary jurisdiction.

This contradicts the very assumption this Court has said underlay the creation of the Board.

"And whatever may be the form of the agree-

[11] The statutory authority to suspend is derived from the power under Section 15 to disapprove conference agreements, combined with the power under Section 25 (46 U. S. C. § 824) summarily to revoke the prior order approving the conference agreement. *Contract Rates—North Atlantic*, 4 F. M. B. 98, 104 (1952).

ment, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority." *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, at 487.

III. The Order of the Board Was Not Subject to Judicial Review.

The decision of the court below holding the order of the Board to be "final" for purposes of judicial review is contrary to related decisions of this Court and represents an unprecedented expansion of the scope of judicial review under the Hobbs Act (5 U. S. C. § 1031 *et seq.*), which Act provides the jurisdictional basis for appeals from certain decisions of the Federal Communications Commission, the Secretary of Agriculture, and of the Maritime Administration and the Federal Maritime Board.

The court reasoned that since the refusal of the Board to suspend the institution of the contract/noncontract proposal had "grave consequences" on the operations of Isbrandtsen (R. 256), it was therefore "final" for purposes of judicial review. It is submitted that the economic impact of an administrative order is not, in and of itself, a sufficient basis for judicial review.

The court relied upon *Columbia Broadcasting System* v. *United States,* 316 U. S. 407 (1942), but it is submitted that that decision supports no such sweeping conclusion. In the dissenting opinion, Mr. Justice Frankfurter warned against confusing hardship with finality. He stated, "Hardship there

may well come through action of an administrative agency. But to slide from recognition of a hardship to assertion of jurisdiction is once more to assume that only the courts are the guardians of the rights and the liberties of the people." *Id.* at 446. The opinion of the majority of the Court in no way disagreed with this statement. Indeed, Chief Justice Stone recognized that there are a great many important administrative rulings which are not reviewable "either because they do not adjudicate rights or declare them legislatively, or because there are adequate administrative remedies which must be pursued before resorting to judicial remedies, or because there is no occasion to resort to equitable remedies." *Id.* at 424. It is submitted that the order here in question has present all three of these elements adverted to by Chief Justice Stone, any one of which is sufficient to preclude review.

In declining to take immediate action on the proposal, the Board did not hold the proposal lawful and thereby adjudicate or declare rights. Nor did the Board in any way preclude persons who might be injured by it from seeking damages or reparations therefor under Section 22 of the Act if it should ultimately be held unlawful by the Board or on appeal by a court.

Administrative action involving grave economic consequences has been held not to be "final" for purposes of court review. *United States* v. *Los Angeles R. R.,* 273 U. S. 299 (1927). And, indeed, administrative action resulting in the loss of many thousands of dollars which could in no way be recovered if the action were wrong, as distinguished from this case where Isbrandtsen could obtain full recoveries under the Shipping Act if it should be suc-

cessful in its protest, has been held not to be "final" for purposes of court review. *Petroleum Co.* v. *Comm'n.*, 304 U. S. 209 (1938); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938).

The decision of the court below in *Seaboard & Western Airlines* v. *Civil Aeronautics Bd.*, 181 F. 2d 515 (D. C. Cir. 1949), shows a clear awareness of these principles. In that case temporary mail rates fixed by the Board pending determination of permanent rates were held not to be "final" appealable orders despite the claim that the award of these temporary rates to the petitioner's competitors placed petitioner at a competitive disadvantage and threatened its very survival. The fact that in the subsequent permanent rate proceedings retroactive adjustments could be made was deemed controlling.

Finally, it is submitted that it is unwise for the courts to interfere with the administrative process at this stage. The field of transportation and especially international transportation is complex and in many cases unique. The business of common carriers by water "involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal". *U. S. Navigation Co.* v. *Cunard S. S. Co., supra,* at 485. The Board has adopted a procedure whereby on the basis of statements submitted to it by the conference and the protestants to the proposed conference action, the Board can, with its own expert

knowledge of the many facets to the problem, weigh the equities and grant or withhold interim relief pending its ultimate determination. Certainly under such a procedure there is no cause to resort to equitable remedies, for the very equities that the court can consider have been considered by the Board. The court below, moreover, did not find an abuse of discretion by the Board and in the absence of that fact, as that court itself recognized a month and a half later speaking through the same judge, there could be no reversal of an administrative order refusing to suspend action pending an ultimate decision of the matter by the administrative agency concerned. *Columbia Broadcasting System* v. *Federal Communications Commission,* D. C. Cir., decided March 11, 1954.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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